2004

David L. Orlob v. Wasatch Medical Management, a Utah general partnership : Brief of Appellee

Utah Court of Appeals

James C. Haskins; Thomas N. Thompson; Haskins and Associates; Dan M. Durrant; Attorneys for Appellant.
David W. Scofield; Peters Scofield Price; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

DAVID L. ORLOB, Appellee and Cross-Appellant, -vs- WASATCH MEDICAL MANAGEMENT, a Utah general partnership, et al, Appellants and Cross-Appellees.	Court of Appeals No. 20040216-CA Case No. 910901061CN

CROSS-APPELLANT'S OPENING BRIEF AND APPELLEE'S BRIEF

APPEAL FROM A FINAL JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT, HON. WILLIAM B. BOHLING
DATED FEBRUARY 10, 2004

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PARTIES TO THE PROCEEDING

Plaintiff:	David L. Orlob
Defendants:	Wasatch Medical Management, a Utah general partnership ("WMM")
	Kenneth C. Jensen, individually and as general partner of WMM
	Earlene B. Jensen, individually and as general partner of WMM
	Steven C. Jensen, individually and as general partner of WMM
	Keven J. Jensen, individually and as general partner of WMM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES

Page

Statutes:

Rules:

Other Authorities:

JURISDICTION

This matter was transferred to the Court of Appeals by the Utah Supreme Court pursuant to UTAH CODE ANN. § 78-2-2(4). This Court has Jurisdiction to decide cross-appellants' appeal pursuant to UTAH CODE ANN. § 78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED ON CROSS-APPEAL

1. **Issue:** Did the trial court err in failing to apply the doctrine of practical construction in its interpretation of the Combined Agreement, when faced with the absence of the identification in the Combined Agreement, itself, as to whom commission payments were intended to be made?

Standard of Review: The trial court's interpretation of a contract presents a question of law, reviewed for correctness. *Green River Canal Co. v. Thayn,* 2003 UT 50 ¶ 16, 84 P.3d 1134, 1140.

2. **Issue:** Is the trial court's finding no. 23, that the commission payments under the Combined Agreement were intended to be paid 50% to PCG and 50% to appellant, rather than 100% to appellant, supported by substantial evidence?

Standard of Review: A trial court's factual findings are reviewed under a clearly erroneous standard. *Washington County Water Conservancy District v. Morgan,* 2003 UT 58 ¶ 23, 82 P.3d 1125, 1132.

APPLICABLE STATUTES AND RULES

UTAH R. CIV. P. 12(b): Defenses and objections. How presented.

> Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of

the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

UTAH R. CIV. P. 12(h). Waiver of Defenses.

A party waives all defenses and objections not presented either by motion or by answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15(b) in the light of any evidence that may have been received.

UTAH R. CIV. P. 17(a). Parties plaintiff and defendant. Real party in interest.

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's name without joining the party for whose benefit the action is brought; and when a statute so provides, an action for the use or benefit of another shall be

> brought in the name of the state of Utah. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

UTAH R. CIV. P. 25(c). Substitution of parties. Transfer of interest.

> Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Subdivision (a) of this rule.

STATEMENT OF THE CASE

A. Nature of the Case.

This case arises out of a contract to sell a physicians' billing service, Physician's Control Group, Inc. ("PCG") by Cross-Appellant and Appellee David L. Orlob ("Orlob"), to Appellants and Cross-Appellees Wasatch Management ("Wasatch"), Kenneth C. Jensen ("Ken"), Earlene B. Jensen ("Earlene"), Steven K. Jensen ("Steve"), and Keven J. Jensen ("Keven"), (collectively the "Jensens). The Jensens did not want to assume any of the outstanding liabilities of PCG, so they refused to purchase the stock in PCG, of which Orlob was the sole owner, and instead structured an asset purchase. Compensation to Orlob for the asset purchase was designed, as is common for such transactions to avoid double taxation, to be paid in the form of monthly commissions, for about five years, in exchange for Orlob assisting with the transfer of the business to the Jensens and for Orlob providing a covenant not to compete with the Jensens for ten years.

To effectuate this plan, PCG, Orlob, individually, Wasatch, and Ken, Earlene, Steve and Keven, individually, each executed an agreement entitled the "Combined Agreement." The Jensens commenced making the monthly commission payments under the Combined Agreement directly to Orlob, individually. Differences arose surrounding Orlob's advice to the Jensens on how to protect the goodwill and contract pricing of PCG, and disputes arose between Orlob and the Jensens, including a claimed breach by Orlob of the covenant not to compete, with both parties claiming the other had breached. PCG, which received no commission payments under the Combined Agreement, and had no bank account, employees or business, was allowed by Orlob to be administratively dissolved by the state. The Jensens continued to make commission payments to Orlob under the Combined Agreement, with certain adjustments they claimed made them whole for Orlob's alleged breaches, however, until the Internal Revenue Service placed a lien on PCG's interest in the Combined Agreement, and sold that interest to the Jensens. At that point, the Jensens ceased making commission payments to Orlob, and Orlob sued to recover the commission payments that represented the remaining consideration for his sale of his physician's billing service.

B. Course of Proceedings.

On November 6, 2000, the trial court granted a final judgment, on summary judgment against Orlob, ruling that he had no individual interest under the Combined Agreement and dismissing the Jensens counterclaims by stipulation, without prejudice to renewing them after appeal if the case came back. Orlob filed with the Third District Court, Salt Lake County, a timely notice of appeal to the Utah Supreme Court on

November 14, 2000. The case was poured over by the Utah Supreme Court to this Court for decision.

On October 4, 2001, the Utah Court of Appeals reversed the trial court's finding, on summary judgment, that Orlob had no individual interest under the Combined Agreement, in *Orlob v. Wasatch Management,* 2001 UT App. 287, 33 P.3d 1078 ("*Orlob I*"). This Court reversed, as follows:

> The parties attached greater value to the covenants to assist in the transfer and maintenance of accounts and not to compete. Without these covenants, whatever good will and reputation being transferred could be undermined by competition from either Orlob or PCG. The parties agreed that the covenants of the Combined Agreement were worth more than $500,000 during its term. ***Without Orlob's personal covenants and promises, and personal assistance and involvement, the agreement would have little value.*** Thus, we conclude that Orlob has an individual interest in the Combined Agreement, which is tied to his covenants to assist in the transfer and maintenance of accounts and not to compete.
>
> ¶ 20 We conclude the Combined Agreement unambiguously includes Orlob, individually, as a party. Further, he has an individual interest in the Combined Agreement separate and distinct from PCG's interest. His interest arises from the personal covenants he made to assist with the orderly transfer and maintenance of accounts and not to compete with Wasatch and the Jensens. [FN3]
>
> FN3. We do not address what percentages of interest Orlob and PCG had in the Combined Agreement, nor do we address whether Orlob breached the Combined Agreement.
>
> ¶ 21 Accordingly, we reverse the district court's grant of Wasatch and the Jensen's motion for summary judgment. We reverse the district court's denial of Orlob's motion for partial summary judgment. We remand for further proceedings consistent with this opinion.

Id. ¶¶ 19-21, 33 P.3d at 1082 (emphasis supplied).

On remand, the trial court held a trial on June 25, 26 and 27, 2002. Prior to entering its findings of fact, conclusions of law and judgment, the Jensens filed a post-trial brief, raising new defenses for the first time. Orlob moved to strike such brief and, after hearing on the motion to strike, the trial court struck the Jensen's post-trial brief, took arguments on whether pre-judgment interest was awardable, and entered its finding of fact, conclusions of law, and judgment, on February 10, 2004. A timely notice of appeal to the Utah Supreme Court, was filed by the Jensens with the Third District Court, on March 9, 2004 and a timely notice of appeal to the Utah Supreme Court was filed by Orlob with the Third District Court on March 10, 2004. Both appeals were poured over to this Court for decision and this Court consolidated the appeals, and designated the Jensens as Appellants and Cross-Appellees, and Orlob as Cross-Appellant and Appellee.

C. Disposition By Trial Court.

The trial court entered its final judgment on February 10, 2004, awarding Orlob damages in the sum of $340,162.10.

STATEMENT OF FACTS FOUND BY THE TRIAL COURT[1]

1. Plaintiff David L. Orlob ("Orlob"), in approximately 1978, started a physicians billing service known as Professional's Control Group. R. 1632.

2. In December, 1984, Orlob incorporated Professional's Control Group as Professional's Control Group, Inc., a Utah corporation ("PCG"). R. 1632.

3. Defendant Wasatch Medical Management was, at all material times, a

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[1]The following facts are taken from the like-numbered paragraphs in the trial court's findings of fact. R. 1631-49.

partnership consisting of defendants Kenneth C. Jensen, Earlene B. Jensen, Steven K. Jensen and Kevin J. Jensen (collectively, the "Jensens"). Prior to August 1, 1988, the Jensens operated a physician's billing service primarily in the Ogden area. R. 1632.

4. During 1987 and the first part of 1988, the Jensens desired to enter the Salt Lake valley market to provide physician billing services. During that time, PCG provided service to between 30% and 35% of the anesthesiology market in the Salt Lake valley, as well as some physicians in Logan and some physicians in Payson, Utah. R. 1632.

5. At that time, PCG provided those billing services to physicians at the rate of 6% of collections. R. 1632.

6. When the Jensens attempted to enter the Salt Lake market, they contacted a variety of anesthesiologists, some of whom were clients of PCG, and offered billing services at 4%. Up until that time, the market for billing services had been relatively stable and PCG had not received complaints about its price for billing services. R. 1633.

7. The Jensens' efforts led at least three of PCG's clients to leave PCG. R. 1633.

8. Orlob approached the Jensens, advised them that he was interested in selling PCG and leaving the Salt Lake City area, and inquired into their interest in purchasing PCG. The Jensens were adamant that they were not interested in purchasing the stock of PCG, because they did not want to assume any outstanding liabilities of that existing corporate entity. R. 1633.

9. After negotiations, the parties agreed to a purchase and sale and

memorialized that agreement in a document titled "Combined Agreement," executed August 31, 1988 by the parties, and effective as of August 1, 1988 (the "Combined Agreement"). R. 1633.

10. The Combined Agreement states: "For Orlob's assistance in the transfer and maintenance of accounts listed on Schedule 'B' Jensens shall pay to Orlob a commission that has been calculated at $7,500 per month." Combined Agreement, ¶ 8. R. 1633.

11. The Combined Agreement also states: "Orlob further agrees and warrants he will not compete directly or indirectly in Utah against or adverse to Jensens in the billing and collection business for a period of ten years commencing August 1, 1988." Combined Agreement, ¶ 6. R. 1633-34.

12. "Orlob has an individual interest in the combined agreement, which is tied to his covenants to assist in the transfer and maintenance of accounts and not to compete." *Orlob I*, 2001 UT App. 287, ¶ 19. R. 1634.

13. At the time the Combined Agreement was executed, all of the physicians listed in Schedule "B" to the Combined Agreement were under contract with PCG to pay 6% of total collections for services rendered. However, William M. Hamilton, M.D., one of the physicians on that list, had sent a letter, dated August 10, 1988, to Orlob and PCG providing notice of his termination of his contract as of December 1, 1988. All of the doctors listed on Schedule "B" were on contracts that allowed termination upon either 30 or 90 days' written notice. R. 1634.

14. After execution of the Combined Agreement, Orlob advised PCG's employees that they would become employees of the Jensens. Orlob even specifically

dissuaded at least on valuable employee, who expressed an intention to terminate her employment when she learned the Jensens would be purchasing the company, from leaving. That employee remains with the Jensens to this day and has been a valuable asset to them, including training new employees. Orlob also took all necessary steps to place PCG's checking account under the Jensens' control and to transfer all files of PCG to the Jensens' control. Steven Jensen prepared a form 1099 to David L. Orlob for commission payments made in 1989. R. 1634.

15. The Jensens repeatedly requested that Orlob introduce them to physicians as the new owners of the company. Orlob refused to do so, advising the Jensens that if doctors who previously had been offered billing at 4% by the Jensens learned that the Jensens were the new owners of the company, it would affect their willingness to continue on their contracts to pay 6%. The Jensens then advised at least one such doctor that they were the new owners of the company, which created the very reaction Orlob predicted, with the Salt Lake anesthesiologists threatening to terminate their contracts. Thereupon, the Jensens chose to negotiate reductions in the billing rates for those doctors from 6% to 5%. From that time forward, the relationship between the Jensens and David L. Orlob deteriorated, with each periodically threatening litigation against the other. R. 1635.

16. The only evidence of Dr. Hamilton's average income per month is Exhibit 5, which was prepared by the Jensens, showing an average income per month for 1988 of $18,044.00. Because Dr. Hamilton had already sent a letter terminating his 6% contract at the time the Combined Agreement was executed, Orlob breached his warranty with respect to Dr. Hamilton. Ultimately, Dr. Hamilton did not terminate as his

letter stated he would, based upon the efforts of the Jensens to renegotiate his contract. According to Exhibit 3, which was prepared by the Jensens, there were no reductions for Dr. Hamilton until May, 1989, at which time Dr. Hamilton went from 6% to 5%. 1% of $18,044.00 per month is $180.44 per month. As of May, 1989, when Dr. Hamilton went from 6% to 5%, a reduction in the $7,500.00 per month Orlob commission of $180.44 per month is appropriate to remedy the breach of warranty for Dr. Hamilton. R. 1635-36.

17. In or about February, 1990, according to Exhibit 9, Dr. Watson in Payson telephoned the Jensens and advised them that he would be switching his billing agencies, not in any way related to any performance problems but, instead, because of personal disagreements with Dr. Beaty which necessitated a restructuring of their organization. The Jensens took it upon themselves to negotiate with Dr. Watson and Dr. Beaty to form an employee leasing company and to reduce the amount at which they were willing to provide billing services to Dr. Beaty and Dr. Watson from 6% to 4%. Such circumstances are unrelated to any breach of the Combined Agreement by Orlob. R. 1636.

18. With respect to the physicians listed on Schedule "B" of the Combined Agreement who terminated, and replacement doctors:

a. Dr. Stockham terminated as of October, 1989, and, beginning with that date, a reduction in the Orlob commission of $210.54 is appropriate. Dr. Stockham testified that he returned after six months, however, and, therefore, no reduction is appropriate for Dr. Stockham after March of 1990. R. 1636.

b. Dr. Crookston departed as of October, 1989, and a reduction of

$370.71 per month for Dr. Crookston is appropriate under the Combined Agreement. Dr. Christensen replaced Dr. Crookston in March, 1990, such that no reductions for Dr. Crookston are appropriate after February, 1990. R. 1636-37.

c. Dr. Peterson departed as of November, 1989, and that a reduction of $396.64 per month in the Orlob commission is appropriate from and after November, 1989. R. 1637.

d. Dr. Decker departed as of October, 1990, and that a reduction of $260.44 per month in the Orlob commission is appropriate from and after October, 1990. R. 1637.

e. As of January, 1991, and thereafter, there were enough replacement physicians that, from and after January, 1991, there could be no allowed reductions to the Orlob commission payment under the Combined Agreement. R. 1637.

19. Dr. Peterson departed from the Jensens services to have his billing performed by Tracey Hall, now known as Tracey Kartsone. Ms. Kartsone utilized equipment belonging to Mr. Orlob's new company, leased some space from Mr. Orlob and received consulting services from Orlob in conjunction with the billing services she provided to Dr. Peterson. Ms. Kartsone paid Mr. Orlob some sum of money for leasing and consulting, although the precise sum is in dispute. However, the precise sum is immaterial, because Orlob's knowledge of and assistance to Ms. Kartsone, and receipt of funds from her, established her as an agency for competition with the Jensens with respect to Dr. Peterson. As such, Orlob breached his personal covenant not to compete directly or indirectly with respect to Dr. Peterson. R. 1637-38.

20. On January 25, 1990, the Jensens issued a letter to Orlob stating that they were going to commence reducing the commission payment by $801.93, which they calculated as their monthly net profit from Dr. Peterson. The Jensens in fact made that deduction from the Orlob commission payment from that date forward and the Court finds that such resolution elected by the Jensens as the remedy for such breach was fair and appropriate. R. 1638.

21. On or about October 1, 1990, the United States Department of the Treasury, Internal Revenue Service served a notice of levy upon the Jensens concerning taxes owing by PCG. The Jensens made no payment to Orlob, individually, for the commission payment due October 25, 1990, and no payment to Orlob, individually, thereafter. R. 1638.

22. The Internal Revenue Service held a public auction on December 10, 1990, at which it sold only the right, title and interest of PCG in and to the Combined Agreement. The Jensens were the successful bidder at that auction and purchased the PCG interest in the Combined Agreement. There was no levy upon any individual interest of David L. Orlob, at any time, by the Internal Revenue Service, nor did the public auction result in the sale of any of the interest of David L. Orlob, individually, in the Combined Agreement. R. 1638.

23. The Combined Agreement, itself, does not state whether or how the commission payment should be divided between PCG and David L. Orlob, individually. Absent any instruction in the Combined Agreement, the Court found that the commission payments go one-half, or 50%, to PCG and one-half, or 50%, to Orlob, individually. R. 1639.

24. The Schedule of Commission Payments attached to the Court's Findings of Fact and Conclusions of Law as Exhibit A accurately reflects those commissions payable and paid, or portions paid or otherwise credited, such that the amounts owing, with interest, to Orlob for his 50% in the Combined Agreement would be the total shown on Exhibit A attached to the Findings of Fact and Conclusions of Law, or in other words, the sum of $340,162.10. R. 1639.

ADDITIONAL FACTS

25. Every commission check was written, on its face, to David L. Orlob, individually, and not to PCG. See Exhibit 47, Checks (admitted R. 1682, Tr. 28:20-29:10).

26. The Jensens issued an IRS form 1099 for commission payments to Orlob, individually, but not to PCG. R. 1685, Deposition Testimony of Steven K. Jensen, Tr. 37:4 - 39-15.

27. In all their correspondence to Orlob while the commission payments were being made, the Jensen's refer to them as Orlob's commission or "your" commission when the letter was addressed to Orlob. *See* Exhibits 7, 8, 9 and 32.

SUMMARY OF ARGUMENT

CROSS-APPELLANT'S BRIEF

At trial, no evidence was adduced to show that any of the funds paid under the terms of the Combined Agreement were paid to PCG. The only evidence presented was to the contrary. The parties to the Combined Agreement always treated the amounts owed under the Combined Agreement as amounts owed to Orlob; specifically, all checks issued were issued to Orlob, PCG had been administratively dissolved by the

State of Utah, was defunct for all intents and purposes. There is simply no evidence from which the trial court could have concluded that half of the amounts owing under the Combined Agreement belonged to PCG.

ARGUMENT

I. RULES OF CONTRACT CONSTRUCTION REQUIRED THE TRIAL COURT TO APPLY THE DOCTRINE OF PRACTICAL CONSTRUCTION TO DETERMINE WHO WAS ENTITLED TO RECEIVE THE COMMISSION PAYMENTS UNDER THE COMBINED AGREEMENT.

The trial court, in Finding of Fact No.23, stated: "The Combined Agreement, itself, does not state whether or how the commission payment should be divided between PCG and David L. Orlob, individually. Absent any instruction in the Combined Agreement, the Court found that the commission payments go one-half, or 50%, to PCG and one-half, or 50%, to Orlob, individually." This finding of fact was entered contrary to established rules of contract construction that must guide a court when a written instrument itself is ambiguously silent on the very issue that was before the trial court, namely, who is entitled to the monthly commission payments?

The general rule of contract construction applicable in this case is the doctrine of practical construction, long recognized as capable of answering such questions by looking at the conduct of the parties, themselves, in discharging their contractual obligations:

> In the determination of the meaning of an indefinite or ambiguous contract, the construction placed upon the contract by the parties themselves is to be considered by the court. The practical construction or uniform conduct or practice of the parties under a contract is a consideration of much importance in ascertaining its meaning, and that consideration is entitled to great, if not controlling, weight in ascertaining the parties' understanding of the

> contract terms and language, since the parties are in the best position to know what was intended by the language employed.

17A AM. JUR. 2D *Contracts,* § 354 (1991)(footnotes omitted). This general principle is mirrored in the RESTATEMENT (SECOND) OF CONTRACTS § 202 (1981):

> Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.
>
> Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

Id. § 202(4)-(5).

The Utah courts long ago adopted the doctrine of practical construction under circumstances where the contract language itself is not plain. The Utah Supreme Court has stated: "When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce their interest." *Bullough v. Sims,* 16 Utah 2d 304, 308, 400 P.2d 20, 23 (1965) (quoting *Crestview Cemetery Ass'n v. Dieden,* 54 Cal.2d 744, 8 Cal.Rptr. 427, 356 P.2d 171 (1960)). *Accord Eie v. St. Benedict's Hospital,* 638 P.2d 1190, 1195 (1981) (enforcing agreement in accordance with parties' conduct); *Upland Industries Corp. v. Pacific Gamble Robinson Co.,* 684 P.2d 638, 642 (Utah 1984) (court will enforce agreement in light of two and one half years of conduct of parties).

In this case, the facts supporting a practical construction that Orlob, not PCG, was the intended recipient of the commission payments are compelling, yet were not used by the trial court to resolve its stated dilemma. First, this was intended to be, and

was, the sale of a business that Orlob had created and operated over the years, in part due to Orlob's desire to relocate at a point in the near future. *See* FOF ¶¶ 1-8; R. 1632-33. The only reason that the sale was not a stock sale was to accommodate the Jensen's desire not to assume PCG liabilities. *See* FOF ¶ 8; R. 1633. The bulk of the value in the Combined Agreement was contained in Orlob's personal covenants to assist in the orderly transfer of the business and his ten year non-compete agreement. *See* FOF ¶¶ 10-12; R. 1633-34; and *Orlob I*, 2001 UT App. 287 ¶¶ 19-21, 33 P.3d at 1082.

The Jensens submitted an IRS form 1099 to the IRS reporting commission payments to Orlob, personally, not to PCG. Every check written by the Jensens for commission payments was written to Orlob, personally, not to PCG. *See* Exhibit 47. The Jensens' correspondence reflects that they considered the commission payments to be "Orlob's." *See* Exhibits 7, 8, 9 and 32. PCG had no bank account in which to place any payments, PCG was entirely defunct and allowed to be administratively dissolved by the State of Utah. *See* Exhibit 40, R. 1681, Tr. 81:5-82:6.

Rules of contract interpretation are applied as a matter of law. The doctrine of practical construction should have been used as the respected rule of contract interpretation it is, to resolve the trial court's expressed dilemma over the absence of express contract language. All the evidence of the conduct of the parties established that the commission payments were made by the Jensens to Orlob, the only contracting party in a position to receive them, and the doctrine of practical construction therefore would not allow for the arbitrary reduction of Orlob's judgment by 50%, for unpaid commission payments. This Court should reverse the arbitrary reduction of Orlob's

right to receive the commission payments by 50%, and apply the legal tool of the doctrine of practical construction to award all of the commission payments to Orlob, and none to PCG.

II. THE TRIAL COURT'S FINDING OF FACT REDUCING ORLOB'S JUDGMENT BY 50% IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

As was shown in Point I, above, the trial court, in Finding of Fact No. 23, effectively conceded that it had no basis in fact to allocate 50% of the commission payments to PCG. Indeed, the Jensens themselves concede that no evidence exists in the record to allocate 50% of the commission payments to PCG, although they attempt to characterize the failure as being that no evidence supports Orlob getting 50%. *See* Appellants' Brief at 49 ("In this case, however, the Defendants have located no evidence in the record whatsoever supporting the District Court's finding. There is, literally, no evidence to marshall.") The Jensens are correct insofar as they concede that not one whit of evidence supports any portion of the commission payments under the Combined Agreement being allocated to PCG. There is, therefore, nothing to marshall on that front.

Defendants have, however, utterly failed to marshall the evidence supporting the trial court's finding that Orlob is entitled to receive commission payments, some of which evidence is set forth above in Point I on the doctrine of practical construction. Since all of the evidence supporting a practical construction shows Orlob receiving the commission payments, and not PCG, and there is no evidence that PCG was to receive

any commission payments,[2] the trial court's finding that takes away 50% of the commission payments from Orlob and gives it to PCG is clearly erroneous and is not supported by substantial evidence. The judgment entered should be ordered to be doubled, because all the evidence shows that Orlob, not PCG, was entitled to receive, and in fact received, the commission payments.

APPELLEE'S BRIEF

ARGUMENT

III. THE JENSENS' UNTIMELY DEFENSE BASED ON ORLOB'S BANKRUPTCY WAS CONSIDERED FULLY AND PROPERLY REJECTED BY THE TRIAL COURT.

The Jensens sought to raise their "standing" (actually real party in interest) defense for the first time, after more than eight years, after the conclusion of one appeal to this Court, and after trial on the merits on remand, by way of a post-trial memorandum. R. 1484-99. Orlob moved to strike the memorandum and defenses it purported to raise. R. 1503-26. The trial court ruled in Orlob's favor, struck the memorandum and entered judgment in Orlob's favor, finding that the defenses sought were waivable and had been waived.

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[2]Nor is there any rational reason offered as to why Orlob might subject the payments to the double taxation they would receive if they were made to PCG.

A. THE JENSENS WAIVED THEIR REAL PARTY IN INTEREST DEFENSE, THAT THEY SEEK TO PURSUE BY MISLABELING IT AS A "STANDING" DEFENSE,[3] BY NOT RAISING IT UNTIL AFTER TRIAL AND ALMOST TEN YEARS AFTER THEY ANSWERED.

The Jensens' novel effort to raise, for the first time in ten years of litigation, and entirely post-trial, a defense based on Orlob's post-complaint bankruptcy filing is unsupported in the evidence, was found by the trial court to be waivable, and was stricken by the trial court as untimely raised.

The Jensens' revisionist history on this issue is palpable. The Jensens argue that the evidence at trial showed, although the trial court failed to find, that Orlob's filing of a bankruptcy after he filed this action, without listing this action as an asset on his bankruptcy schedules, amounts to "concealment" and that the bankruptcy trustee's acquisition of legal title to the claim prohibits Orlob from pursuing it.

In their memorandum opposing Orlob's motion to strike the Jensens' untimely new defenses raised in their post-trial memorandum, the Jensens argued: "The reason that no relief may be granted in this case is that the Defendant violated his duty of disclosure on the bankruptcy schedules he filed in California[,]" Opp Mem at 3; R. 1539. When the Jensens argued the proffered relevancy of the bankruptcy schedules, in opposition to Orlob's motion in limine and prior to the commencement of trial, however, they asserted an entirely different theory of relevancy. In "Defendants' Opposition to Plaintiffs' Motion in Limine Re: Bankruptcy Schedule," dated May 28, 2002 (R. 1401-04), the Jensens did not argue about any "duty of disclosure" but instead represented

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[3]The law demonstrating that the Jensens' defense is a real party in interest defense, and not jurisdictional, is discussed below, in Part C.

to the trial court that the bankruptcy schedules would be offered by the Jensens "only to show that [Orlob's] view of the value of his interest in the Agreement was that it had *no* value. [Emphasis in original.]" Defendants' Opposition to Plaintiff's Motion in Limine Re: Bankruptcy Schedule, dated May 28, 2002, at 3, R. 1403. In keeping with that very limited scope for which the bankruptcy schedule was offered, the Jensens' trial memorandum, dated June 20, 2002,[4] contained none of the arguments concerning "standing" (in reality, real-party-in-interest) or judicial estoppel that the Jensens asserted for the first time in their supplemental post-trial memorandum. Instead, the Jensens' trial memorandum argued that the bankruptcy schedule showed "By [Orlob's] own admission, his interest in the Combined Agreement had *little or no value*." Defendants' trial memorandum, dated June 20, 2002, at 9 (Appendix 1) (emphasis added). The bankruptcy schedules were offered at trial for that limited purpose and received by the trial court strictly for that limited purpose.

At no time in the ten years prior to trial did the Jensens ever raise the real party in interest defense that they unsuccessfully urged upon the trial court post-trial. This is true despite multiple opportunities to do so. The Jensens did not raise the defense in their answer. R. 62-67.

A decade earlier, the Jensens argued the merits of the case fully in their memorandum in opposition to Orlob's motion for summary judgment and in support of a cross-motion for summary judgment, filed on or about December 6, 1993. R. 194-

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[4]Defendants' Trial Memorandum is not listed on the record index. A date-stamped copy is contained within the records of Orlob's counsel and is attached hereto as Appendix 1.

220A. However carefully the Court may scrutinize that memorandum, it will find no mention of any "duty to disclose" or, for that matter, any mention of bankruptcy whatsoever, despite the fact that, throughout that memorandum, the Jensens sought to defeat Orlob's claims. Nor is there any mention of bankruptcy or a "duty to disclose" in the April 18, 1994 trial memorandum filed by the Jensens. R. 328-343. Nor do those defenses appear in the Jensens' memorandum in support of motion for partial summary judgment [on Orlob's claims], dated September 7, 1999. R. 421-549. Nor do they appear in the Jensens' response to Orlob's motion for partial summary judgment on Orlob's claims, dated February 22, 2000. R. 701-705. Nor did the Jensens raise the issue in their brief to the Utah Court of Appeals on the prior appeal, in which they argued all their existing defenses against liability. Nor did the Jensens raise these issues at any time during the course of the trial itself or during closing arguments, even after the trial court invited supplementation of the issues the trial court desired to have argued orally. R. 1683, Tr. 40:7-18.

Instead, it was only after trial, for the first time, that the Jensens raised this concept of "duty to disclose" on the bankruptcy schedules for any defense of "standing" which is really a real-party-in-interest defense,[5] or "judicial estoppel." But no evidence was received at trial on those issues, because the bankruptcy evidence was offered and received for the narrow purpose of showing that Orlob himself did not believe that the Combined Agreement had any value to him, an argument that the trial court

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[5]The Jensens in that post-trial memorandum also sought to raise for the first time the defense of judicial estoppel, which effort was also rejected by the trial court. Appendix 2.

rejected by virtue of its findings. The case of *Keller v. Southwood North Medical Pavilion, Inc.*, 959 P.2d 102 (Utah 1998), is therefore dispositive and the trial court properly struck the defense as untimely and entered judgment.

B. "STANDING TO SUE" AND "REAL PARTY IN INTEREST" ARE DISTINCT CONCEPTS AND THE "REAL PARTY IN INTEREST"DEFENSE CAN BE, AND HAS BEEN, WAIVED.

The Jensens are aware that the trial court ruled that their late effort to raise new defenses would not be allowed because their failure to raise the defenses timely resulted in a waiver. They therefore seek to mislabel their waived, real party in interest defense, as a "standing" defense, because true "standing to sue" is jurisdictional in nature, and cannot be waived.

Controlling Utah precedent and the Utah Rules of Civil Procedure establish that this is not a jurisdictional issue of standing, but rather, one of a defect in parties or real party in interest that defendants have waived.[6] By asserting that it is the bankruptcy

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[6]The Jensens may hold out hope for success in their argument, perhaps, because many courts make the mistake of confusing real party in interest issues as "standing to sue," when they are not. *See* Charles Allen Wright, Arthur R. Miller & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE, § 3531, at 341-45 & n. 8 (1984) ("At times courts are tempted to draw from standing decisions in addressing such matters as the existence of a cause of action, identification of the real party in interest, capacity, intervention, and even the procedural rights of bankrupts."). In *Federal Deposit Insurance Corp. v. Bachman*, 894 F.2d 1233 (10th Cir. 1990), the United States Court of Appeals for the Tenth Circuit explained why it is important to distinguish between the very different concepts of standing and real party in interest:

> The term "standing," however, is used loosely in many contexts to denote the party with a right to bring a particular cause of action. This practice leads to much confusion when it is necessary to distinguish between "standing" in its most technical sense and the concept of real party in interest under Fed. R. Civ. P. 17(a). . . . Using the term "standing" to designate real-party-in-interest issues

(continued...)

trustee, rather than Orlob, who owns the cause of action in this case, the Jensens are asserting that this action is not "prosecuted in the name of the real party in interest." UTAH R. CIV. P. 17(a). That defense is required by the Utah Rules of Civil Procedure to be asserted in a responsive pleading. Specifically, UTAH R. CIV. P. 12(b) states: "Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required. . . ." UTAH R. CIV. P. 12(b). The Jensens filed such a responsive pleading but failed to raise the defense that Orlob was not the real party in interest to pursue this lawsuit in their answer, the Jensens waived the defense. *See, e.g.*, UTAH R. CIV. P. 12(h).

In *Lewis v. Porter*, 556 P.2d 496 (Utah 1976), "[p]laintiff sued to recover a sum he claimed under an agreement with defendant." *Id.* at 496. The defendant was listed as an individual, operating under an assumed name of Lynn S. Porter House Movers, Inc. *See id.* The case proceeded through trial and a judgment was entered in favor of the plaintiff and against the defendant, individually. *See id.* The Utah Supreme Court

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[6](...continued)

> tempts courts to apply standing principles outside the context in which they were developed. The instant case illustrates the problems that can result. Defendants are correct that standing may implicate the Article III requirement of a "case or controversy" and issue of subject matter jurisdiction which cannot be waived. **However, failure to timely raise a real-party-in-interest defense operates as a waiver. [Citations omitted.] Even if standing jurisprudence is helpful by analogy in resolving real-party-in-interest issues, this does not convert real party in interest into a non-waivable issue of subject matter jurisdiction.**

Id. at 1235-36 (emphasis added).

held than an individual defendant's failure to object to a defect in parties (claiming that a corporate defendant should have been named rather than the individual) which was not raised timely, was waived "as provided in Rule 12(h), U.R.C.P." *Id.* at 496. That case, decided expressly under Rule 12(h), is in accord with the long-standing law in the state of Utah.

In *Smith v. Royer*, 26 Utah 2d 83, 485 P.2d 664 (1971), the Court held that, where the plaintiff's "standing as the real party in interest in the replevin action was not raised below, . . . it was waived." 26 Utah 2d at 87, 485 P.2d at 666-67. Indeed, the controlling law in Utah has been settled for over 100 years. In *Fritz v. The Western Union Telegraph Company*, 25 Utah 263, 71 P. 209 (1903), the Utah Supreme Court ruled that an objection made at trial on real party in interest grounds "was urged too late, and must be held to have been waived." 25 Utah at 280, 71 P. at 214. This 100 year old law establishes that the real party in interest defense is not jurisdictionally-based, but rather it is waivable. The *Lewis* decision establishes that such rule remains the same under UTAH R. CIV. P. 12(h). *See Lewis*, 556 P.2d at 496.

Here, despite having knowledge of Orlob's bankruptcy filing for more than eight years, the Jensens chose not to seek to amend their pleadings to assert a real party in interest defense, but rather, to sit back and wait and make a strategic judgment to assert such defense only after they might lose on their other defenses, attempting to couch it in the guise of jurisdiction. The law that controls this defense does not allow such gamesmanship. The trial court was correct to strike the supplemental trial

memorandum purporting to raise the defense.[7]

C. THE FEDERAL LAW CITED BY THE JENSENS DOES NOT STAND FOR THE PROPOSITION THAT A "REAL PARTY IN INTEREST" DEFENSE IS JURISDICTIONAL.

The Jensens desire to divert attention from the controlling Utah law, and to focus on federal cases they contend support their entitlement to raise their defense, for the first time, eight years after they filed their answer, and after trial concluded. The Jensens rely primarily on the case of *Stein v. United Artists Corp.*, 691 F.2d 885 (9th Cir. 1982), and its progeny, for the proposition that Orlob may not pursue his lawsuit because it was not listed as an asset in his bankruptcy schedules.[8] The Ninth Circuit Court of Appeals ruled that the Steins, individually, "have no standing as creditors or guarantors of Century," *id.* at 895, to assert Century's anti-trust claims that had not been listed on its bankruptcy schedules. The rationale for that ruling was that the "competitive injury" is to the corporation. *See id.* at 896. The issue of whether Stein could pursue an antitrust claim as an assignee of Century, the bankrupt, was resolved because Century did not own the claim to assign to Stein in the first place, the bankruptcy trustee did. *See id.* at 889 ("The court held that Century's failure to list the antitrust claim in the Chapter XI proceedings prevented the asset from vesting in

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[7] *See also* UTAH R. CIV. P. 25(c), authorizing a trial court to allow an original plaintiff to continue an action even where its interest has been transferred.

[8] It is important to note that, in *Stein*, the debtor had filed for bankruptcy on October 11, 1976, *see id.* at 888, prior to the anti-trust case being filed in June, 1979, *see id.* at 889. The plaintiff, Stein, sought to proceed with the lawsuit "as assignee" of the bankruptcy debtor, Century on a post-bankruptcy assignment. *See id.* at 889. Here, Orlob was the party directly injured by the Jensens' breach and he had already filed suit before bankruptcy.

Century at the conclusion of the Chapter XI proceedings. Hence Century could assign no claim."). Thus, the true holding in *Stein* was that there was no valid original assignment from the bankrupt debtor to the individuals seeking to assert an assigned claim in the litigation.

That a jurisdictional issue of standing is not implicated here is demonstrated by a more recent Ninth Circuit case explaining *Stein.* In *Pershing Park Villas Homeowners Association v. United Pacific Insurance Company*, 219 F.3d 895 (9th Cir. 2000), the Ninth Circuit Court of Appeals held that claims that had not been listed on bankruptcy schedules could be pursued by the bankrupt developers where an objection had not been timely raised. The defendants in that case, relying on *Stein*, objected to the developers' standing "on the rule that the bankruptcy estate retains title to pre-bankruptcy causes of action not disclosed to or abandoned by the bankruptcy trustee." *Id.* at 899.[9] The Ninth Circuit Court of Appeals rejected the idea that there was no standing to sue in the jurisdictional sense, stating:

> There can be no question that these injuries are concrete, traceable to Reliance's conduct, and remediable by money damages. Nor can there be any question that these injuries were literally "suffered by" the developers, *see id.*, though the right to sue on them may have passed to their bankruptcy estates by operation of the bankruptcy laws. . . . Reliance claims that lack of title to their claims deprives the developers of

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[9]The cases of *Havelock v. Taxel (In re Pace),* 159 B.R. 890 (9th Cir. BAP 1993), *Stanley v. Sherwin-Williams Co.,* 156 B.R. 25 (W.D. Va. 1993), *In re Benefield,* 102 B.R. 157 (Bankr. E.D. Ark. 1989) and *Robinson v. J.A. Wiertel Construction,* 185 A.D.2d 664, 586 N.Y.S.2d 59 (App. Div. 1992), cited by the Jensens, all recite this basic proposition of bankruptcy law. That this is a truism of bankruptcy law does not, however, transform a real party in interest defense, that arises under that set of facts, into a jurisdictional "standing to sue" defense, as is described more fully in the *Pershing Park* discussion, below. The cases cited by the Jensens do not even address whether the real-party-in-interest defense is waivable.

> constitutional standing to sue. Yet we have specifically distinguished between constitutional standing and "third-party" standing to bring a claim to which another holds title.

Id. at 900. Here, Orlob is a party to the very contract the Jensens breached, as were the plaintiffs in *Pershing Park*.

Other language from the Ninth Circuit is also instructive. For example, the Ninth Circuit quoted the district court ruling:

> I think the question [ ] posed by an issue of standing is whether a party has a substantial [stake in a] controversy to make a justiciable matter. I think it is clear that the three individual plaintiffs do have a significant stake in the controversy.
>
> The issue [respecting title to the claim] may be one of the capacity to sue rather than standing. . . . And I think under all the circumstances that have been adduced in this trial, the objections by the defendants to [plaintiffs'] proceeding with this litigation [have] been waived.

Id. at 900. The Ninth Circuit Court of Appeals then held:

> The district court was entitled to conclude that the time and manner in which Reliance raised the issue of standing was strategic. We cannot say that the district court clearly erred in excluding any non-jurisdictional issues of standing not designated for trial in the pretrial order.

Id. at 900. Thus distinguishing between jurisdictional issues of "standing" and prudential issues of "standing" which, in *Pershing Park*, the trial court had identified as "capacity to sue,"[10] the Ninth Circuit Court of Appeals held essentially that issues of

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[10] In an earlier case, the Ninth Circuit had recognized this precise issue as a real party in interest issue. In *United States ex rel. Dennie Reed v. C.E. Callahan*, 884 F.2d 1180, 1183 n. 4 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit expressly recognized that the issue of whether a debtor or the debtor's Chapter 7 trustee had the right to sue was a question of real party in interest that was waivable. *Id.* (Party waived real party in interest objection that Chapter 7 trustee was the only

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parties are waivable and had been waived. Therefore, the holding of *Stein*, distinguished by the Ninth Circuit Court of Appeals in *Pershing Park*, does not stand for the proposition that Orlob may not continue his lawsuit here. Instead, the United States Court of Appeals for the Ninth Circuit has made clear that, even though a bankruptcy estate may hold title to a claim pursued by a party to a contract, that is a defense that is waivable.

Here, the defense clearly has been waived, as the trial court held. The Jensens have known about Orlob's bankruptcy filing since before they took his deposition on March 17, 1994, well over ten years ago. The Jensens' counsel specifically questioned Orlob about his bankruptcy:

> Q. Have you ever filed bankruptcy?
>
> A. Yes.
>
> Q. When did you file bankruptcy?
>
> A. I believe it was May of '92.

R. 1684, Orlob Deposition at 38:11-14. The Jensens' counsel then specifically questioned about whether this lawsuit was listed on the bankruptcy schedules:

> Q. Did you disclose in the statements and schedules that you had a potential action pending with regard to this case?
>
> A. I don't recall.

R. 1684, Orlob Deposition at 39:22-25. Thus, the Jensens knew about this issue for more than eight years prior to trial, yet chose not to raise it until after the conclusion of

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[10](...continued)
person with right to sue as the real party by failing to raise it in a timely manner.)

closing arguments following trial,[11] and the trial court's ruling adverse to them.

Instead, during that entire eight year period, the Jensens chose to take a different position, namely, that Orlob in fact had ***no*** interest in the combined agreement, at all. It is only after they have failed in that assertion at trial that they now, for strategic advantage, attempt to take the position that Orlob cannot pursue the interest that he has been found to have, based on a failure to list an asset that defendants have known about, or had the opportunity to know about, for more than eight years. This apparently strategic decision on the Jensens' part was properly found by the trial court to have resulted in a waiver for its untimely assertion.

This is particularly true when the Jensens allowed the litigation to proceed, invoking the time and energies of the trial court, this Court on the first appeal, and now again, and of Orlob and his counsel in defending against their ultimately unsuccessful position, only to attempt to change it after seeing that they did not prevail. Moreover, the Jensens are not arguing that they should pay what they owe to the bankruptcy trustee, but rather, that they should not have to complete paying for the physicians' billing service they purchased and continue to operate profitably to this day. Viewed in that light, there is little equitable appeal to the Jensens' effort to avoid payment.

D. THIS COURT UNQUESTIONABLY HAS JURISDICTION.

It is unquestionable that David L. Orlob had standing to sue at the time he filed the initial complaint herein, in January, 1992, prior to the date of his bankruptcy. This

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[11] Indeed, the trial court invited counsel to add issues for closing argument that were not on the trial court's suggested issues for closing, yet the Jensens still held off raising this issue until after the trial court ruled adversely to them. R. 1683, Tr. 40:7-18.

Court's jurisdiction over the case is determined as of that time. "Standing is determined at the time suit is filed in the trial court, and subsequent events do not deprive the court of subject matter jurisdiction." *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440, 446 n.9 (Tex. 1993).[12]

Orlob was and is an actual party to the Combined Agreement and its breach by the Jensens injured him. Even if the bankruptcy estate had pursued these claims, the residual left after payment to creditors and of the expenses of the estate would revert to Orlob. *See* 11 U.S.C. § 726(a)(6) (requiring distribution of remaining estate to debtor). *See also* 6 COLLIER ON BANKRUPTCY, ¶ 726.02[6] n. 43 ("For this reason, the debtor has standing to participate in litigation that may result in a surplus."). Orlob thus, under all circumstances, even if the bankruptcy were re-opened, retains a very real interest in the pursuit of the claim, is injured by the Jensens' non-payment and has standing.

Further, this case is the same as *Pershing Park*, in which the Ninth Circuit Court

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[12] *Accord Get Set Organization v. Philadelphia Federation of Teachers*, 446 Pa. 174, 181, 286 A.2d 633, 636 n. 6 (1971) ("[O]nce the jurisdiction of a court attaches, it exists for all times until the cause is fully and completely determined. . . . As a general rule, jurisdiction once acquired is not defeated by subsequent events, even though they are of such a character as would have prevented jurisdiction from attaching in the first instance."); *Cleveland Branch, National Association for the Advancement of Colored People v. City of Parma*, 263 F.3d 513, 538 (6th Cir. 2001) ("We join the First, Fifth, Seventh, Eighth, and Ninth Circuits, which have all explicitly held that standing is determined as of the time the complaint is filed."). *See also Euclid-Mississippi v. Western Casualty & Surety Company, Inc.*, 249 Miss. 547, 554, 163 So.2d 676, 679 (1964) ("Jurisdiction is determined as of the time of filing suit."); *Mansur v. Coffin*, 54 Me. 314, 317 (1866) ("The jurisdiction is determined by the facts existing at the time when the action was commenced."); *State ex rel. Cowan v. District Court of First Judicial District*, 131 Mont. 502, 508, 312 P.2d 119, 123 (1957) ("Jurisdiction however is to be determined as of the time the action was commenced. 21 C.J.S. Courts, Section 112, page 171."); *Bell v. Employers Mutual Casualty Co.*, 198 Wis.2d 347, 362, 541 N.W.2d 824, 830 (Ct. App. 1995) ("[W]e determine jurisdiction as of the time an action is commenced. . . .").

of Appeals found that the contracting parties had standing to sue because they, not the bankruptcy trustee, had "suffered" the breach, even though the bankruptcy trustee owned the claim. *See* 219 F.3d at 900.

E. THE JENSENS' EFFORT TO RECAST THEIR STRICKEN, UNTIMELY, JUDICIAL ESTOPPEL DEFENSE DOES NOT AVAIL THEM.

The Jensens argue in the "standing" portion of their Brief, that Orlob engaged in willful misconduct involving the courts by not listing this lawsuit as an asset. First, there is no evidence in the record that the omission was willful. The trial court did not make such a finding and the bankruptcy evidence admitted was not admitted for any such purpose. Second, however, this confusing portion of the Jensens' Brief is apparently designed to convince this Court that Orlob should be estopped from pursuing his claim, which argument is the untimely-raised "judicial estoppel" defense the trial court struck. The defense of judicial estoppel was waived, and is in any event inapplicable, as discussed below.

This judicial estoppel defense, like the real party in interest defense, was raised for the first time, post-trial and, like the real party in interest defense, was stricken by the trial court as untimely raised.[13] Apparently recognizing that they cannot prevail on

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[13]The Jensens may not call their judicial estoppel defense by its real name in their brief because they clearly cannot make out a judicial estoppel under Utah law. In *Salt Lake City v. Silverfork Pipeline Corp.*, 2000 UT 3, 5 P.3d 1206, the Utah Supreme Court made clear that, in the Utah courts, judicial estoppel will not be used against a party where there is no evidence that the party against whom judicial estoppel is sought knowingly misrepresented any facts in a prior proceeding. *See* 2000 UT 3 ¶ 33, 5 P.3d at 1217, n.15 ("The purpose behind judicial estoppel is not served in a case such as this, where there is no evidence that the party against whom judicial estoppel is sought knowingly misrepresented any facts in the prior proceeding."). Further, judicial estoppel will not be applied in Utah "where the party seeking to invoke judicial estoppel had

(continued...)

appeal unless they convince this Court that their defense is jurisdictional, but hoping to use their argument of "concealment" to smear Orlob nonetheless, the Jensens continue to assert that Orlob's failure to list them was deliberate.

First, there is no testimony or other evidence introduced at trial to that effect. The testimony of Orlob was that he had two brief meetings at a bankruptcy mill and signed the schedules they prepared. R. 1682, Tr. 126:4-14. A review of the schedules, themselves, which were not admitted for the purpose of showing any "concealment," shows that Orlob, in addition to not listing his claim against the Jensens, also did not list, although he could have obtained a discharge of them if they were listed, the Jensens' claims against Orlob for breach of contract. This failure by Orlob to list a debt that could have been discharged suggests that the failure to list the claim, both of which involved the Jensens, was mere inadvertence. The Jensens were not parties to the bankruptcy proceeding and were in no way prejudiced by the inadvertent oversight of Orlob, one that benefitted them because their claim against him was not discharged.

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[13](...continued)
equal or better access to the relevant facts." *Jones Waldo Holbrook & McDonough v. Dawson*, 923 P.2d 1366, 1371 (Utah 1996). It is also required, under Utah law, that the party seeking to invoke judicial estoppel was a party to the prior proceeding, and that the party against whom judicial estoppel is invoked must have prevailed upon its statement against the party seeking to invoke judicial estoppel, in the prior proceeding. *See Stevensen v. Goodson*, 924 P.2d 339, 353 (Utah 1996) ("[T]he rule followed in Utah requires that the party seeking judicial relief must have prevailed upon its statement in the earlier proceeding: '[A] person may not, to the prejudice of another person deny any position taken in a prior judicial proceeding between the same persons or their privies involving the same subject-matter, if such prior position was successfully maintained.'"). In other words, Utah law requires reliance by the party seeking to invoke judicial estoppel. *See, e.g., Schaer v. State*, 657 P.2d 1337, 1341 n.3 (Utah 1983) ("the absence of any reliance renders the doctrine of judicial estoppel or estoppel by oath inapplicable to the present case."). No evidence was introduced by the Jensens to uphold a finding on any of these elements.

Still, the Jensens cite *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414 (3d Cir. 1988), for the proposition that a "duty to disclose" somehow precludes Orlob from having standing in a jurisdictional sense. In *Oneida*, however, judicial estoppel was imposed against a Chapter 11 debtor. The more recent Third Circuit case of *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3d Cir. 1996) points out, in *Oneida*, the debtor had listed the persons in defendants' position here as creditors, without any mention of possible offset, and ***that*** is why judicial estoppel was imposed. *See Ryan Operations G.P.*, 81 F.3d at 363 (Oneida judicially estopped because amount owed to creditor as liability listed, but claim against that creditor for possible offset omitted).

Oneida pointed out that "the doctrine of judicial estoppel does not apply 'when the prior position was taken because of a good faith mistake rather than as part of a scheme to mislead the court.'" *Id.* at 362. Here, as noted, the Jensens' affirmative claims against Orlob were also inadvertently omitted, although defendants had sent Orlob a letter threatening to sue him. That is far different from *Oneida*. There was no evidence introduced of any willful misconduct on Orlob's part and the trial court entered no such finding, but instead struck their defense. Below, the Jensens also relied on *Browning Manufacturing v. Mims (In re Coastal Planes, Inc.)*, 179 F.3d 197 (5th Cir. 1999). But even in *Browning Manufacturing*, the Fifth Circuit Court of Appeals recognized that the omission of an asset from bankruptcy schedules must be coupled with affirmative evidence of bad faith. *See id.* at 211-12. Judicial estoppel was applied in *Browning Manufacturing* because there was affirmative evidence showing both that Coastal knew of the facts giving rise to its inconsistent position and that Coastal had a

motive to conceal its claims. *See id.* at 212. Here, the Jensens introduced no evidence of any kind to suggest that Orlob knowingly sought to conceal his claim against them and this defense was, in any event, properly stricken by the trial court as untimely.

IV. THE TRIAL COURT PROPERLY APPLIED THE STATUTE OF FRAUDS.

The Jensens attempted to argue that the Combined Agreement had been subject to an oral modification. Although they argue that the "fact that the parties reached an understanding that payments to [Orlob] would be reduced proportionately is soundly supported in the record[,]" Opening Brief at 24-25, the fact is that Orlob denied such a modification in his testimony. R. 1681, Tr. 78:6-19. UTAH CODE ANN. § 25-5-4(1)(a) states:

> The following agreements are void unless the agreement, or some note or memorandum of the agreement, is in writing, signed by the party to be charged with the agreement: (a) every agreement that by its terms is not to be performed within one year from the making of the agreement . . .."

Id. The Combined Agreement clearly falls within the terms of the statute of frauds, because it "by its terms is not to be performed within one year from the making of the agreement." Indeed, the Combined Agreement contains a ten-year non-compete provision[14] and defined the "commission period" as commencing "October 1, 1988 and terminat[ing] July 31, 1994." Combined Agreement, at 2-3. "The rule is well settled in Utah that if an original agreement is within the statute of frauds, a subsequent agreement which modifies the original written agreement must also satisfy the

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[14] *See Reagan Outdoor Advertising, Inc. v. Lundgren,* 692 P.2d 776, 778 (Utah 1984) (oral non-compete agreement extending past one year void under statute of frauds).

requirements of the statute of frauds to be enforceable." *Golden Key Realty, Inc. v. Mantas,* 699 P.2d 730, 732 (Utah 1985). Since the Jensens introduced no written modification signed by Orlob, and Orlob denied any agreement to modify on the witness stand, the statute of frauds controlled the trial court's decision, and no enforceable modification had been proved. As to the testimony to which the Jensens refer, the trial court, by not making a finding that there was sufficient evidence to take the alleged modification out of the statute of frauds, and by applying the statute of frauds, necessarily concluded that the Jensens' proffered evidence was insufficient to convince the trial court otherwise.

The Jensens point to *Pasquin v. Pasquin,* 1999 UT App. 245, 988 P.2d 1, and contend that it refutes the propriety of the application of the statute of frauds in this case. The Jensens simply misread *Pasquin*. In *Pasquin*, the enforceability of an oral employment agreement was involved. *See id.* ¶¶ 3,6,10, 988 P.2d at 2-4. The term of the alleged oral employment contract was for the employee's "lifetime." *See id.* This Court recognized that such term, by its nature indefinite, could be performed within one year if the employee died. *Id.* ¶ 18, 988 P.2d at 6. The Combined Agreement here, in contrast, ***by its terms*** requires payments to extend for a period over one year and requires performance on a covenant not to compete for ten years. Those terms are not indefinite and expressly require performance beyond a period of one year. Likewise, in *Zion's Service Corp. v. Danielson,* 12 Utah 2d 369, 366 P.2d 982 (1961), relied on by the Jensens, the term of a contract between a member and a corporation was indefinite and subject to termination at any time. *Id.,* 12 Utah 2d at 372, 366 P.2d at 984-85. This is entirely unlike the situation here, where the Combined Agreement expressly

requires performance to occur over a period that extends beyond one year. Since the Combined Agreement is within the statute of frauds, so is the alleged modification.

V. THE TRIAL COURT'S FINDING THAT THE BREACHES BY ORLOB DID NOT VITIATE THE JENSENS' PAYMENT OBLIGATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Jensens argue that the trial court "made no express factual findings with respect to whether [Orlob's] breaches of the [Combined Agreement] either were or were not material." Opening Brief at 28. This ignores the express findings of fact by the trial court concerning thebreaches. FOF ¶ 16 expressly discusses Orlob's breach of warranty to deliver Dr. Hamilton at a 6% commission, and makes a finding as to the appropriate remedy for that breach, under the circumstances. FOF ¶ 17 expressly discusses Doctors Watson and Beatty and their renegotiation of their commission payment from 6% to 4%, expressly finding that such renegotiation and reduction was completely unrelated to any breach by Orlob. Finally, the trial court, on finding that Orlob breached his covenant not to compete with respect to one physician, Dr. Peterson, found in FOF ¶ 20, that the Jensens had gone forward with the contract and elected a remedy to deal with that situation that was fair and appropriate.

The Hamilton and Peterson situations were the only express findings of breach where there was any finding of adverse economic impact to the Jensens under the Combined Agreement. In each of those situations, based on the facts, the trial court imposed an appropriate remedy to compensate the Jensens. The Jensens have failed to attack the sufficiency of the trial court's findings listed above. They have failed to make any effort to marshall the evidence in favor of those findings and then attempt to show that the findings are unsupported by any substantial evidence. Based on that

failure alone, this Court should refuse to review the Jensens' third point of appeal, as to whether they should have been excused from any further payment obligation, because it must be assumed that substantial evidence supports the findings. *See 438 Main Street v. Easy Heat, Inc.,* 2004 UT 72, ¶ 69, 99 P.3d 801, 817.

The Jensens apparently attempt to avoid the marshalling requirement by arguing that "materiality" is a question of law, not fact. In support of that argument, they cite three cases, *Hermansen v. Tasulas,* 2002 UT 52, 48 P.3d 235, *Gohler v. Wood,* 919 P.2d 561 (Utah 1996) and *S & F Supply Co. v. Hunter,* 527 P.2d 217 (Utah 1974). The "materiality" discussed in each of these cases is not whether a particular breach of contract was a material breach of contract, but rather, whether certain facts, either omitted or misrepresented, were "material" in a fraud context. Each of those cases supports a conclusion that the "materiality" component of a representation or omission in a fraud case is essentially objective, and therefore a legal question. This is not a fraud case.

The controlling law that answers the question of whether a breach of contract is so material as to justify relieving the non-breaching party of further performance obligations is *Coalville City v. Lundgren,* 930 P.2d 1206 (Utah Ct. App. 1997).

In *Coalville City,* an outdoor sign company contended that the City had breached its agreement by not purchasing or leasing a sign and that the company therefore was relieved of its obligation under the agreement to remove its billboards over an eighteen year period. *See id.* at 1207-08. The trial court held, based on the facts, that the breach was not material. This Court cited the following authorities that the determination of materiality of a breach of contract is a question of fact):

> "The law is well settled that a material breach by one party to a contract excuses further performance by the non-breaching party." *Holbrook v. Master Protection Corp.*, 883 P.2d 295, 301 (Utah App.1994). What constitutes a material breach is a question of fact. *Olympus Hills Shopping Ctr., Ltd. v. Smith's Food & Drug Ctrs., Inc.*, 889 P.2d 445, 458 (Utah App.1994) ("Whether a party has materially breached a lease is generally a question of fact for the fact finder."), cert. denied, 899 P.2d 1231 (Utah 1995 . . ..

Coalville City, 930 P.2d at 1209. This ruling is also supported by the RESTATEMENT (SECOND) OF CONTRACTS, § 241 (1981), which lists the factual considerations that a court must look at to resolve the fact question of whether a breach of contract is material. One consideration expressly listed is whether the injured party could be adequately compensated, *see id.* § 241 (b), a consideration that the trial court's findings resolved by determining adequate compensation to the Jensens. Another express consideration is the extent to which the party failing to perform will suffer forfeiture. *See id.* § 241(c). Here, the Jensens argue that they should be relieved of their obligation to pay for an entire business, due to breaches that are easily remedied as the trial court did. The Jensens simply argued for a forfeiture that the trial court would not allow. Thus, substantial evidence supported the trial court's findings and decision. The Jensens' failure to marshall such evidence, and choice to offer evidence supporting only their argument, cannot be excused. The trial court heard all the evidence and ruled based upon substantial evidence.

VI. THE TRIAL COURT CORRECTLY AWARDED PRE-JUDGMENT INTEREST.

Again, the Jensens fail to marshall evidence to support the trial court's finding on pre-judgment interest, as set forth in the exhibit attached to and incorporated in its findings of fact. R. 1644-49. The calculation of pre-judgment interest in this case is

pure math.

If there were no claims of offset in this case, interest on each unpaid monthly commission sums owing under the Combined Agreement would be made by adding interest to each monthly commission payment as it became due and remained unpaid. This is a general principle of law, allowing prejudgment interest as a consequential damage:

> Prejudgment interest is allowed on the theory that an injured party should be fully compensated for his or her loss, and is appropriate when the underlying recovery is compensatory in nature and when the amount at issue is easily ascertainable and one upon which interest can be easily computed.

45 AM. JUR. 2D *Interest and Usury* § 42 (1999). Utah law is in accord with this standard for awarding prejudgment interest:

> "A prejudgment interest award is proper when the damage is complete, the loss can be measured by facts and figures, and the amount of loss is fixed as of a particular time." *Lefavi v. Bertoch,* 2000 UT App 5, ¶ 24, 994 P.2d 817 (quotations and citations omitted). "[A] court may only award prejudgment interest if damages are calculable within a mathematical certainty." *Id.*

Harris v. IES Associates, Inc., 2003 UT App 112, ¶ 52, 69 P.3d 297, 311. In *Harris*, like here, the defendant argued that no prejudgment interest could be awarded because of its entitlement to offsets. *See id.*, ¶ 53. This Court rejected that argument, stating that "Utah appellate courts have recognized that 'offsets should be deducted before interest is calculated when an interest bearing award arises at the same time as the offsets.'" *Id.* (quoting *Richard Barton Enters., Inc. v. Tsern,* 928 P.2d 368, 381 (Utah 1996)). The test is whether Orlob's damages can be calculated with mathematical certainty, a test that has been defined by the Utah courts:

> For damages to be calculable with mathematical certainty, they must be ascertained "in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value." *Price-Orem Inv. Co. v. Rollins, Brown & Gunnell, Inc.,* 784 P.2d 475, 483 (Utah Ct. App. 1989) (quoting *Fell v. Union Pac. Ry. Co.,* 32 Utah 101, 88 P. 1003, 1007 (1907)).

Lefavi v. Bertoch, 2000 UT App 5, ¶ 24, 994 P.2d 817, 823.[15]

In this case, each offset is specific to a particular monthly commission payment. Each monthly commission payment is mathematically certain, and each monthly offset has been declared by the Court and is mathematically certain. Exhibit "A" to the proposed findings, R. 1644-49, specifically accounts for the offsets in the fashion required by the Utah courts, i.e., before the calculation of interest. Any ruling that Orlob may not have interest that is easily calculable simply give defendants a windfall use of the money they should have paid, but did not, for over a decade, and would constitute an unjust enrichment.

VII. THE TRIAL COURT'S RULING THAT THE 6% WARRANTY WAS A WARRANTY OF THE DELIVERED CONTRACTS IS SUPPORTED BY THE LANGUAGE OF THE COMBINED AGREEMENT AND THE TESTIMONY.

The language of the Combined Agreement states: "Notwithstanding the

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[15]The Jensens' contention that the assessment of respective interests between Orlob and PCG would defeat Orlob's right to prejudgment interest also has previously been rejected by the Utah courts. In *Lefavi*, the trial court was unable to calculate the percentage interest of plaintiff in an investment, which had been disputed, until the parties' entered a stipulation. 2000 UT App 5, ¶¶ 9-13, 994 P.2d at 820-21. The Court of Appeals found that the "damages in this case were complete, the loss was measured by facts and figures, and the loss was fixed at the time of each sale[,]" *id.* ¶ 27, 994 P.2d at 823, and rejected the argument against prejudgment interest as "unpersuasive." *Id.* ¶ 26.

foregoing, Orlob warrants that all listed [] anesthesiologists accounts must be willing to pay 6% of total collections for services rendered " The trial court took testimony on the meaning of this ambiguous provision Orlob testified that each doctor was delivered under a contract by which the doctor was required to pay 6%, although Hamilton had sent a letter before Orlob completed his deal with the Jensens, indicating that Hamilton was unwilling to continue at 6%and threatening to terminate his contract (at a time after closing with the Jensens)

Steve testified that it was the Jensens' "hope" that the warranty was for the life of the contract, even though most of the doctors could terminate on 90 days notice R 1682, Tr 54 11-55 14 The trial court took argument on the issue on the second day of trial R 1682, Tr 133 21-153 11 Following that argument, the trial court entered its findings of fact on the record R 1682, Tr 153 12-157 8 As part of those findings, the trial court expressly found "So I find it not credible that the Jensens were to suggest, first of all, that the meaning of this warranty was that, for the entire course of this contract that, what Mr Orlob, what Mr Orlob was offering, was that these doctors would not deviate from six percent and secondly, that he had agreed to go around and introduce them as new owners of the business and expect that the doctors would stick with the six percent " R 1682, Tr 155 17-23

The trial court recited an abundance of evidence that supported that finding The Jensens made no effort to marshall that evidence in attacking the trial court's finding, incorrectly arguing instead "The Court did not base its ruling on any finding as to the intention of the parties based upon the Combined Agreement or any other factors in evidence at trial " Opening Brief at 40 What is most astounding about the Jensens'

contention in their brief is that they actually quote a snippet from the trial judge's findings, but ignore everything else the judge said.

Instead of marshalling the evidence that the trial court relied on, they characterize evidence that they deem favorable to them, characterizations the trial judge already rejected after hearing the evidence. The fact that the Jensens plow through facts they consider favorable to them effectively concedes that they are challenging the trial court's factual finding set forth on the record. The judge considered all the facts and ruled against the Jensens based on substantial evidence.

The trial court's finding on the record is supported by substantial evidence and by his finding of a lack of credibility on the part of the Jensens. It should be upheld.

VIII. THE JENSENS' ARGUMENT ATTACKING THE COURTS' FINDING THAT ORLOB IS ENTITLED TO SOME SHARE OF THE COMMISSIONS IS MISPLACED.

The Jensens attack FOF ¶ ¶ 23-24, that Orlob is entitled to commission payments under the Combined Agreement, the Jensens again fail to marshall the evidence that supports Orlob's entitlement to receive commission payments, including all of the evidence set forth in Part I, above, on the doctrine of practical construction. Instead, they focus on the lack of evidence that PCG is entitled to receive, or ever received a commission payment, and attempt to turn the trial court's dilemma on its head. There was, indeed, no evidence introduced to show that PCG was entitled to receive, or ever in fact received, a single commission payment. All of the evidence showed that Orlob was entitled to receive, and did receive, each commission payment made and in fact was the recipient of an IRS form 1099 for commission payments.

Since the Jensens made no effort to marshall the evidence that Orlob was in fact

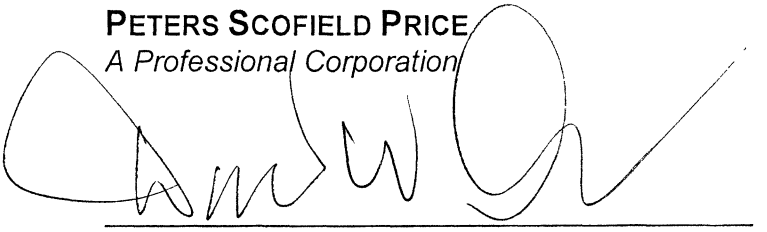
entitled to receive the commission payments, they cannot argue that the trial court was in error for awarding damages for commission payments not paid to Orlob. Their effort to turn the Court's dilemma on its head is not well taken, and Orlob should prevail on his own point of appeal on this issue.

CONCLUSION

For the foregoing reasons, the judgment should be reversed as to the sum of damages. This Court should order the amount of judgment to be doubled, based on Orlob's entitlement to 100% of the commission payments under the Combined Agreement, and in all other respects, the trial court's judgment should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of December, 2004.

PETERS SCOFIELD PRICE
A Professional Corporation



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the above and foregoing Cross-Appellant's Opening Brief and Appellee's Brief were mailed, postage prepaid, this 8th day of December, 2004, to the following:

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY
STATE OF UTAH

DAVID L. ORLOB, Plaintiff, vs. WASATCH MEDICAL MANAGEMENT, a Utah general partnership KENNETH C. JENSEN, individually and as general partner of Wasatch Medical Management, EARLENE B. JENSEN, individually and as general partner of Wasatch Medical Management, STEVEN K. JENSEN, individually and as general partner of Wasatch Medical Management, and KEVEN J. JENSEN, individually and as general partner of Wasatch Medical Management, Defendants.	**DEFENDANTS' TRIAL MEMORANDUM** Civil No. 910901061CN Judge Bohling

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The Defendants herein, by and through their undersigned counsel, hereby submit the following Trial Memorandum.

INTRODUCTION

This case arises from a "Combined Agreement" pursuant to which the Defendants purchased the assets and equipment of Professional's Control Group, Inc. ("PCG"). It is the Defendants' position that it was the understanding of all parties that the assets that were the subject of the Combined Agreement were owned primarily by PCG. The Plaintiff's own deposition confirms this view. *See* Deposition of David L. Orlob at 8, 22-26, attached hereto as Exhibit A.

The Plaintiff has taken the position that the right to receive payments under the Combined Agreement belonged exclusively to him, and not to PCG. Not only is this position inconsistent with the Plaintiff's own deposition, it also conflicts with the law governing corporations. The shareholders of corporations do not jointly own the assets of the corporation; rather, they own only a right to a share of the corporation's distribution of profits, if any. Thus, Plaintiff, as a named party to the Combined Agreement, did not jointly own the assets of the corporation. Instead, he was only a named party to the Combined Agreement because part of that agreement included a covenant not to compete with the Plaintiff individually. The issues in this case are:

1. Whether, and to what extent, David L. Orlob has been properly paid for amounts due to him under the Combined Agreement, as modified by any

subsequent arrangements between the parties; and

2. Whether, assuming the Court finds that additional amounts are now due to the Plaintiff, the Defendants are entitled to offsets from those amounts attributable to the Plaintiff's breach of the Combined Agreement in (a) competing directly with the Defendants' business in violation of the Combined Agreement; (b) failing to deliver physician billing contracts to the Defendants at a commission rate of six percent; and (c) failing to assist with the orderly transfer of the physician accounts from the Plaintiff's business to the Defendants' business.

STATEMENT OF FACTS

In August, 1988, the Plaintiff and the Defendants entered into a Combined Agreement pursuant to which all of the assets of PCG were sold to the Defendants. The Defendant entered into a number of covenants and promises in the Agreement, the most significant of which are as follows:

1. Pursuant to paragraph 5 of the Combined Agreement, Plaintiff Orlob agreed that "[f]or commissions paid and profits shared Orlob warrants that he will assist in the orderly transfer of all accounts to Jensens and assist Jensens to maintain the accounts over the life of this agreement. "
2. Pursuant to paragraph 6 of the Combined Agreement, "Orlob further agrees and warrants he will not compete directly or indirectly in Utah

against or adverse to Jensens in the billing and collection business for a period of ten years commencing August 1, 1988.

3. Pursuant to paragraph 8 of the Combined Agreement, "Orlob warrants that all listed anesthesiologists accounts must be willing to pay 6 percent of total collections for services rendered."

4. Further, during the negotiations leading up to the Agreement, and consistent with his obligations under the agreement as set forth above, Orlob assured the Defendants that all of PCG's clients were satisfied with PCG's billing services, that they intended to remain clients of PCG, and that he would notify each one of the clients that Wasatch would be providing billing services instead of PCG.

5. From the inception of the Agreement, the Plaintiff not only failed to assist in the transferring of the accounts, he failed to use his efforts to maintain those accounts.

6. Many of the clients had, prior to the execution of the Combined Agreement, notified PCG and Orlob that they were extremely dissatisfied with PCG's billing services and that they were terminating PCG's services and going to have Wasatch render billing services for them for a fee of four percent of total collections.

7. Prior to the Agreement's execution, Plaintiff told the clients that Wasatch

was a new and inexperienced company that was not charging enough to stay in business and that if Wasatch was still in business within two years of September 1988, that Plaintiff would refund the difference between what PCG had been charging and what Wasatch was going to charge them.

8. At best, the Plaintiff only notified two of the clients that Wasatch would be providing billing services for them.

9. Indeed, the Plaintiff informed several of the clients that Wasatch had *not* taken over PCG's accounts and that PCG had merely hired Jensens as additional employees of PCG.

10. The clients became aware that Wasatch was indeed performing their billing services and demanded that Wasatch charge them a fee lower than the 6 percent fee agreed upon with PCG.

11. In September, 1988, Plaintiff solicited the business of Dr. Frank Peterson, one of the clients listed on Schedule B of the Combined Agreement, and, on or about April 1, 1989 began directly competing against Wasatch by performing billing services for Dr. Peterson. The Plaintiff initially undertook to service Dr. Peterson's account by relying on the assistance of his friend and employee, Tracey Kartsone, who at the time worked directly for Plaintiff Orlob and under his direction.

12. Pursuant to paragraph 18 of the Combined Agreement, "Orlob grants to Jensens a three-year lease on the present business premises wherein Jensens shall continue the business operations," and granted the Jensens an option to purchase the building.

13. Wasatch fulfilled its lease obligations by making payments directly to the Plaintiff until 1990, when the Plaintiff defaulted on the loan and Wasatch was forced to begin making its lease payments directly to the mortgage company.

14. On or about September 21, 1989, the Plaintiff informed one of the Defendants' employees, Kathy Chapman, that he and a woman named "Tracey" were moving to Los Angeles, California and were going to begin performing billing services for Dr. Frank Peterson, one of Wasatch Medical Management's billing accounts.

15. When he notified Kathy Chapman of his intention to perform billing services for Dr. Peterson, the Plaintiff also remarked that "he didn't want to be around Wastach Medical Management's offices on the following Monday when Jensens found out that he had taken Dr. Frank Peterson's account from Wasatch Medical Management.

16. After relocating to California, Plaintiff Orlob formed a new company in Los Angeles called Electronic Claims Management. Tracey Kartsone was one

of his employees and lived with him for a time. Tracey Kartsone did the billing for Dr. Frank Peterson.

16. By letter to PCG dated September 12, 1988, Dr. Richard Greene terminated the billing services of PCG.

17. By letter to Plaintiff Orlob dated September 15, 1988, Dr. Douglas Hill terminated the billing services of PCG.

18. By letter dated September 26, 1988, Dr. Stephen Shuput terminated the billing services of PCG.

19. By letter dated November 1, 1988, Dr. Donald Decker terminated the billing services of PCG.

20. By letter dated November 28, 1988, Dr. Craig Jensen terminated the billing services of PCG.

21. By letter dated June 2, 1989, Dr. Randall Stockham terminated the billing services of PCG.

22. Drs. Farley, Shuput, and Hill met with Steve and Keven Jensen to express their displeasure at how the business transaction occurred and that they were now having and were continuing to have the billing done at 6 percent when they knew other people were having their billing done at 4 percent.

23. Drs. Farley, Shuput and Hill advised Steve Jensen that they were empowered to represent a number of the physicians covered by the

Combined Agreement, and advised him that they would be changing billing services unless some compromise was made.

24. As of the present date, the Defendants have paid to Plaintiff approximately $170,000.00 in cash and other benefits under the terms of the Combined Agreement.

25. The Plaintiff did not personally own the assets of PCG; rather, those assets, including the contracts with the various physicians, were owned by the corporation.

26. The Plaintiff agreed, explicitly or implicitly, to each and every reduction made by the Defendants to amounts due him under the Combined Agreement.

27. The Plaintiff failed to list any amount allegedly due to him in the statements and schedules he filed in his bankruptcy proceeding in California. Consequently, the Plaintiff has in effect admitted that his interest in the Combined Agreement had no value or minimal value.

ARGUMENT

Simply as a factual matter, the Defendants have complied with all of their obligations under the Combined Agreement, at least until they purchased the interest of PCG in that agreement from the IRS. At that point, they ceased making payments to the Plaintiff. Subsequently, the Utah Court of Appeals determined that Plaintiff Orlob,

individually, had some undefined interest in the Combined Agreement and remanded the case to this Court to determine the nature and amount of that interest. The Court of Appeals found that Orlob's covenants "require[d] Orlob's individual performance; performance solely by PCG does not suffice." *Orlob v. Wasatch Medical Managment*, 33 P.3d 1078, 1081 (Utah Ct. App. 2001). Consequently, this Court must now determine the value of Orlob's interest in the agreement.

To begin with, of course, *after* he filed the instant action, Plaintiff Orlob filed a petition in bankruptcy with the United States Bankruptcy Court for the Central District of California wherein he did not list his interest on his statements and schedules as an asset of his bankruptcy estate. Thus, by his own admission, his interest in the Combined Agreement had little or no value.

Second, Orlob's complete failure to perform *any* of his obligations under the agreement absolved the Plaintiffs from any further duty to perform pursuant to its terms. There is simply no dispute in this case that Orlob failed to honor his express agreements to (1) not compete with the Defendants in their business; (2) provide for the orderly transfer of the physician accounts from his own business to the Defendants' business; and (3) insure that the physicians who transferred their business to the Defendants were willing to pay a six percent commission for the billing services performed by the Defendants.

It is well settled that parties to a contract are obliged to proceed in good faith and

to cooperate in the performance of the contract in accordance with its expressed intent. *Cahoon v. Cahoon*, 641 P.2d 140 (Utah 1982). One who enters into a contract must cooperate in good faith to carry out the intention of the parties when the contract was made. *Weber Meadow-View Corp. V. Wilde,* 575 P.2d 1053 (Utah 1978). The Plaintiff, however, immediately commenced to compete with the Defendants in contravention of the Agreement, by arranging for his own employee to do the billing for Dr. Frank Peterson. Dr. Peterson was one of the physicians whose billing contract was transferred to the Defendants.

Additionally, there is not a scintilla of evidence in this case that Plaintiff Orlob ever did anything at all to assist in the orderly transfers of the physicians accounts to the Defendants. Indeed, he actively undermined that process by telling physician clients that the Defendants had not purchased the billing contracts and instead were merely his own employees. Such conduct cannot be seen as a good faith attempt to meet his obligations under the contract. A party who is seeking to enforce a contract must prove performance of his own obligations. *Holbrook v. Master Protection Corp.*, 883 P.2d 295 (Utah Ct. App. 1994).

A material breach by one party to a contract excuses further performance by the non-breaching party. *Anderson v. Doms*, 984 P.2d 392 (Utah Ct. App. 1999). What constitutes a material breach of a contract is a question of fact. *Coalville City v. Lundgren*, 930 P.2d 1206 (Utah Ct. App. 1997). As the facts of this case abundantly

demonstrate, the Plaintiff Orlob materially breached the Combined Agreement by failing to perform on *any* of his commitments pursuant to the contract. Under such circumstances, the Plaintiff should be deemed entitled to little, if any, additional compensation under the terms of the Combined Agreement.

DATED this 20 day of June, 2002.

James C. Haskins
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing ***Defendants' Trial Memorandum*** was served on the 20th day of June, 2002, by hand delivery to the offices of Plaintiff's counsel as follows:

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